IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

WEDNESDAY, THE 19TH SEPTEMBER 2007 / 28TH BHADRA 1929

CRL.A.No. 259 of 1999()

CRA.22/1997 of ADDL.SESSIONS COURT, NORTH PARAVUR
C.C. NO.1619 OF 1995 OF JUDICIAL FIRST CLASS MAGISTRATE COURT, PERUMBAVOOR

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APPELLANT/2ND RESPONDENT/COMPLAINANT:

GOPALA KRISHNAN NAIR,
JITHA BHAVAN, VOKKAL P.O., PERUMBAVOOR.

BY ADV. SRI.S.SREEKUMAR

RESPONDENTS/APPELLANT-1ST RESPONDENT/ACCUSED:

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1. A.T. RAGHUNATH, S/O. RAJAPPAN NAIR @ THANKAPPAN NAIR,
   IKKARA (HOUSE), (CHANGANADU HOUSE),
   MANJAPRA VILLAGE, NADUVATTOM KARA.

2. STATE OF KERALA, REPRESENTED BY
   PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY ADV. SRI.DEVAN RAMACHANDRAN - R1
SMT.T.G.SEETHAL
PUBLIC PROSECUTOR SRI. PUZHAKKARA MOHAMMED -R2

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 19/09/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.THANKAPPAN, J.

CRL. APPEAL NO. 259 OF 1999

Dated this the 19th day of September, 2007

JUDGMENT

The short question involved in this appeal is whether it is necessary to prove that notice under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as "the Act") has been served on the first respondent - accused in the correct address?

2. The appellant - complainant filed a complaint alleging that the first respondent herein committed offence punishable under Section 138 of the Act. The allegation in the complaint was that the first respondent - accused owed an amount of Rs.1,00,000/- to the complainant during 1995 in connection with the business transaction between them and that in discharge of the said amount, the accused issued Ext.P1 cheque dated 28.2.1995 in favour of the complainant which when presented to the bank for encashment was dishonoured for want of sufficient funds in the account of the accused. On receipt of intimation from the bank, the complainant caused a lawyer's notice on 7.9.1995, but the same was not

accepted by the accused and hence, the complaint was filed. To prove the case against the accused, the complainant himself was examined as PW.1 and Exts.P1 to P7. No oral or documentary evidence was adduced on the side of the defence. On closure of the evidence of the complainant, the accused was questioned under Section 313 Cr.P.C. He denied the allegations levelled against him. After considering the evidence adduced by the complainant, the trial court found the accused guilty under Section 138 of the Act, convicted him thereunder and sentenced him to undergo simple imprisonment for a period of one year. Against the above conviction and sentence, the first respondent - accused filed Crl. Appeal No.22 of 1997 before the Additional Sessions Court, North Paravur and the lower appellate court as per judgment dated 22.1.1997 set aside the judgment of the trial court and acquitted the accused on the ground that the complainant had not served notice to the accused in the correct address as contemplated under clause (b) of the proviso to Section 138 of the Act. To come to this conclusion, the lower appellate court relied on the endorsement " **no such address**" made by the postal authority on Ext.P6 and stated that no complaint can be filed by the complainant before complying with the provisions under clause (b) of the proviso to Section 138 of the Act. Against the finding of the lower appellate court, this appeal is filed.

3. It is the case of the appellant - complainant that the first respondent - accused had not disputed the execution of the cheque or his signature contained in Ext.P1 cheque. Learned counsel appearing for the appellant submits that the acquittal of the accused on the basis of the endorsement made by the postal authority on Ext.P6 is not tenable. To substantiate this contention, learned counsel placed reliance on the judgment of this Court reported in **Bhavani Auto Distributors v. Muraleedharan, 2007(3) I.L.R. Kerala 55**. In the above judgment, this Court had considered the purpose of serving notice under Section 138 of the Act. Reliance was also placed on the decision of the Apex Court reported in **Rajneesh Aggarwal v, Amit J. Bhalla (2001) 1 S.C.C. 631** wherein the Apex Court held that the object of issuing notice under the provisions of the Act was to afford an opportunity to the drawer for making the payment. Further, it is the burden of the accused to prove that the notice sent to him was not sent in the correct address. There is also no evidence to show that the endorsement was made by the postal authority on the basis of any enquiry. It is possible that the accused might have requested the postal authority to make such an endorsement. The accused also has no case that the address in the notice was not his correct address. It has also come out in evidence that the summons sent to the accused from

the lower court in C.C. No.1033 of 1993 was also in the same address. In the above circumstances, the conclusion arrived at by the lower appellate court is not legally tenable. Apart from the above, the Apex Court in the latest judgment reported in **Alavi Haji, C.C. v. Palapetty Muhammed, 2007(3) I.L.R. Kerala 203** considered this point and held in paragraph 15 of the judgment that **"when notice is sent by registered post by correctly addressing the drawer of the cheque, the mandatory requirement of issue of notice in terms of Clause (b) of proviso to Section 138 of the Act stands complied with"**. The Apex Court further held that **"it is then for the drawer to rebut the presumption about the service of notice and show that he had no knowledge that the notice was brought to his address or that the address mentioned on the cover was incorrect or that the letter was never tendered or that the report of the postman was incorrect."**

4. In the light of the dictum laid down by the Apex Court in the above judgment, it can be concluded that the only purpose of service of notice to the accused is to make him aware of the dishonour of the cheque. Further, the lower appellate court ought to have considered whether the endorsement made by the postal authority was true or not. In the above circumstances, this Court is of the view that the judgment of the lower

appellate court has to be set aside. Accordingly, the judgment of the lower appellate court in Crl. Appeal No.22 of 1997 is set aside and the matter is remanded to the court below for fresh consideration. The lower appellate court shall dispose of the matter as expeditiously as possible, at any rate with three months from the date of receipt of a copy of this judgment. The parties shall also appear before the lower appellate court.

The Crl. Appeal is allowed by way of remand.

(K.THANKAPPAN, JUDGE)

sp/

K. THANKAPPAN, J.

CRL.A. NO.259 OF 1999

JUDGMENT

19TH SEPTEMBER, 2007